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No. 80-2056

In the Supreme Court of the United States

OCTOBER TERM, 1981

THE F/V AMERICAN EAGLE, ET AL., APPELLANTS

v.

STATE OF ALASKA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the State of Alaska may assert jurisdiction over the taking and possession of king crab by non-Alaskans on the high seas beyond state territorial waters.

2. Whether, at the time of the violations at issue, State regulation was in any degree preempted because the federal government had asserted exclusive jurisdiction over natural resources, including sedentary marine species, of the outer continental shelf.

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This brief is filed in response to the Court's invitation of October 5, 1981, to the Solicitor General to express the views of the United States.

STATEMENT

1. King crab, a highly mobile creature of the continental shelf, is important to the economy of the State of Alaska (J.S. App. A2, A13). A small share of crab may be harvested within the three-mile territorial limit off the State's coast (the territorial sea), but the significant crab fisheries are beyond

that limit. See *Hjelle* v. *Brooks*, 377 F. Supp. 430 (D. Alaska 1974) (three-judge court); *Alaska* v. *Bundrant*, 546 P.2d 530, 551 (Alaska), appeal dismissed *sub nom. Uri* v. *Alaska*, 429 U.S. 806 (1976). The latter include crab that are born within Alaskan territorial waters and migrate beyond the three-mile limit (J.S. App. A13).

The State has adopted regulations that it construes as applicable to the taking of crab both within the territorial sea and in a large area beyond in which large crab populations are found. The regulations divide the territorial sea and adjacent high seas into "statistical areas" in which crab populations are monitored, and "registration districts" within those areas, in which the State's laws with respect to the taking of crab are enforced (J.S. App. A18-A19, A23 n.18). The State Commissioner of the Department of Fish and Game has the power to close particular districts to all crab harvesting not only at certain preestablished times of the year but also, on an emergency basis, whenever he believes that "circumstances require" (Alaska Stat. § 16.05.060 (1977); J.S. App. A22-A23).[1] The regulations are not limited in their application to citizens of Alaska.

2. In January of 1976, the F/V American Eagle, a fishing vessel bearing a certificate of registry show-

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[1] The parties dispute the question whether, at the time the incidents at issue took place, the regulations clearly established that "registration districts" in which the State's laws would be enforced extended beyond the three-mile limit (compare State Motion to Dismiss or Affirm 18-19, with J.S. 18-20). The State takes the position that districts beyond the three-mile limit were covered, and the court below concluded that, whatever the "ambiguity" of the regulations, the State Commissioner was authorized to close areas beyond that limit to all crab harvesting (J.S. App. A22-A23).

ing Seattle, Washington, as its home port (R. 570) and owned by citizens of Washington, was seen harvesting king crab in the Egg Island District of King Crab Statistical Area "0," in the Aleutian Islands (J.S. App. A4-A5, A9, A88-A90). That area includes waters beyond the three-mile limit (*id.* at A10-A12 & n.9). The vessel had been licensed by Alaska in December 1975 to harvest king crab in another district in that statistical area, but the State had issued an emergency order closing the Egg Island District to crab harvesting after 12 noon on November 7, 1975, until further notice (*id.* at A87-A88).

When the vessel arrived at an Alaskan port on January 15, 1976, to unload its crab, it was seized by state officials, who subsequently filed a complaint in state superior court for forfeiture alleging violations of various regulations and emergency orders applicable to the taking and possession of king crab (J.S. App. A2-A4). The State did not attempt to prove at trial that the violations within the Egg Island District were within the State's territorial waters (*id.* at A11 n.9). The trial court found that the vessel had been used in violation of law through the "taking and possessing [of] King Crab within the Egg Island District between January 2-7th, 1976," when the district was closed to commercial crab harvesting (*id.* at A96). It accordingly declared forfeit the vessel, its on-board gear, and the proceeds from the sale of the crab catch (*id.* at A97).

3. The owners of the F/V American Eagle appealed to the Supreme Court of the State of Alaska, which affirmed the judgment of forfeiture (J.S. App. A1-A67). The owners contended, *inter alia*, that the State lacked jurisdiction to regulate the harvesting

of king crab in areas beyond the three-mile limit (J.S. App. A9).[2] The court rejected the argument (*id.* at A10-A15), relying on its earlier decision in *Alaska* v. *Bundrant, supra.*[3]

In *Bundrant*, the court reasoned that the State could validly prosecute out-of-state fishermen for "wholly extra-territorial activity," *i.e.*, taking and possessing crab within a closed area beyond the three-mile limit, because it was generally established that fishermen who harvested crab in that area would use processing facilities in Alaskan ports and because the unlimited taking of crabs that had migrated from Alaskan territorial waters beyond the three-mile limit would result in a decrease in the crab population within the State's territorial waters. 546 P.2d at 535-536, 552-554. The *Bundrant* court also rejected contentions that the regulation of crab fisheries beyond state territorial waters was an exclusively federal matter (546 P.2d at 538-544) and that state regulation had been preempted by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* (546 P.2d at 544-548).

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[2] The owners also appealed on several other grounds, including the contentions that the regulations at issue were unconstitutionally vague and that the absence of an in rem procedure and prompt hearing on the seizure denied them due process of law (J.S. App. A9). Those two contentions are included in the appeal to this Court (J.S. 14-25), but the United States takes no position on those questions.

[3] That appeal was dismissed for want of jurisdiction after the State filed an opposition arguing that there was no final order in the case. The charges against the out-of-state fishermen were dismissed after the case was remanded to the state trial court (see J.S. 8 n.4).

ARGUMENT

The decision of the Alaska Supreme Court is contrary to decisions of this Court on two independent grounds. It permits an unwarranted extraterritorial assertion of state jurisdiction over noncitizens, and it imposes state jurisdiction in an area and over a resource that, at least during the time of the events in question, were subject to exclusive federal jurisdiction. Although, in light of a subsequent federal enactment, the decision has only limited significance for the future, it ought not stand undisturbed. In the circumstances, the Court may wish to consider summarily reversing the judgment below.

1. *Extraterritorial exercise of jurisdiction.* As a general rule, state jurisdiction does not reach the activities of noncitizens beyond the boundaries of the State. Any attempt, through its courts " 'directly' to assert extraterritorial jurisdiction over persons or property would * * * exceed the inherent limits of the State's power" under the Due Process Clause (*Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977), quoting *Pennoyer* v. *Neff*, 95 U.S. 714, 732 (1878)), and, similarly, any attempt to make its substantive law directly applicable to commercial activities beyond its borders runs afoul of the Commerce Clause. See *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1925).[4]

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[4] The line of cases represented by *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), relied on by Appellee Alaska (Motion to Dismiss or Affirm 3), does not support the decision below. *Pike* teaches that, in the case of a law that has only "incidental" effects on activities beyond the state's boundaries, the law's validity is to be determined by balancing the local interests promoted by the regulation against its burden on interstate commerce and by examining it for even-handedness. 397 U.S. at 142. A law that *directly* regulates activities beyond the state's borders, however, is invalid regardless of how it might fare under the balancing test.

The application of these principles to a State's exercise of jurisdiction over citizens of other states operating in ocean waters beyond its territorial limits was clearly enunciated in *Alaska* v. *Arctic Maid*, 366 U.S. 199 (1961), in which this Court reviewed an Alaska statute that purported to tax ships engaged in freezing salmon off the coast of Alaska.[5] The respondents, freezer ships owned by citizens of states other than Alaska, operated more than three miles off the coast of Alaska but processed salmon caught by smaller vessels both within and beyond state waters. The Court concluded that catching the fish was an extension of the freezer ships' operations and therefore a taxable event (366 U.S. at 202). It noted (*id.* at 203), however, that the State's taxing powers were limited to those fish caught within state waters: "If the fish were taken or purchased outside Alaska's territorial waters, all of respondents' business in the Bristol Bay area would be beyond Alaska's reach." The judgment against the vessels was, accordingly, reversed and the case remanded for a determination of what portion of the catch had been

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[5] While the constitutionality of a tax under the Commerce Clause may depend on factors somewhat different from those governing the constitutionality of regulation of commercial activity (compare, *e.g.*, *Exxon Corp.* v. *Wisconsin Department of Revenue*, 447 U.S. 207, 219-220 (1980), with *Pike* v. *Bruce Church, Inc.*, *supra*), the two types of state action are governed by a common principle. Whether the question is taxation or regulation, a State's attempt *directly* to impose liability on a person, corporate or natural, for activities that are wholly outside of the State is barred. This is analogous to limits on state court jurisdiction that, as the Court explained in *Shaffer* v. *Heitner*, *supra*, are imposed by the Due Process Clause.

taken beyond the borders of Alaska and was, therefore, not taxable. *Id.* at 205.

The situation of the crabbers here is analogous except that Alaska is proceeding against them *only* with respect to their harvesting of crabs beyond the State's territorial waters. Under *Arctic Maid*, such an exercise of jurisdiction is plainly improper.

The attempt of Alaska (Motion to Dismiss or Affirm 7-8) and the *Bundrant* court (546 P.2d at 549-550) to escape the application of this principle by reliance on *Skiriotes* v. *Florida*, 313 U.S. 69 (1941), and its progeny cannot succeed. In *Skiriotes* this Court acknowledged the power of Florida to apply its law respecting equipment permitted for the taking of sponges to the activities of one of its own citizens operating in an area beyond the State's territorial waters. The Court was careful to explain that its decision rested not on any determination that the State's general regulatory jurisdiction extended that far, but rather on the notion that the State could regulate the conduct of its own citizens. 313 U.S. at 76. As the Court noted, "No right of a citizen of any other State is here asserted." *Ibid.*[6]

The reliance of Alaska (Motion to Dismiss or Affirm 8) and the *Bundrant* court (546 P.2d at 551-552) on the so-called "landing law" cases is similarly ill-founded. In *Silz* v. *Hesterberg*, 211 U.S. 31 (1908), this Court upheld a New York law prohibiting the

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[6] Three cases cited by the *Bundrant* court as within "the *Skiriotes* line of cases" all involved states' regulation of the activities of their own citizens (546 P.2d at 549-550). See *Felton* v. *Hodges*, 374 F.2d 337 (5th Cir. 1967); *People* v. *Foretich*, 14 Cal. App. 3d Supp. 6, 92 Cal. Rptr. 481 (1970); *Gherra* v. *California Fish & Game Department*, No. 47823 (N.D. Cal. 1973) (unpublished opinion).

possession of game *within* the State during closed season, without regard to whether the game had been taken within or without the State. If the State were not permitted to foreclose the defense that game had originally been taken outside the State, enforcement of the law to protect the State's own game would have been impeded because the two categories of game were indistinguishable. 211 U.S. at 43. But Alaska did not obtain the forfeiture of the F/V American Eagle for any act occurring within the State's boundaries. *Silz* would control this case only if it had concerned a New York law providing for closed seasons in areas beyond the State's borders and the arrests of individuals for taking and possessing game out of season in those areas. See *Hjelle* v. *Brooks*, 377 F. Supp. 430, 441 (D. Alaska 1974) (three-judge court). Similarly *Bayside Fish Co.* v. *Gentry*, 297 U.S. 422 (1936), which concerned a law regulating the processing *within California* of sardines taken either within or without the State's territorial waters, is inapposite. As the Court noted (297 U.S. at 426), not only was the law's purpose to conserve fish found within the State's waters, but "[i]ts direct operation, intended and actual, [was] wholly local." That is not the case of the application of the regulations in this case.

Finally, contrary to the conclusion of the *Bundrant* court (546 P.2d at 550-551), Alaska's extraterritorial application of its laws regulating crab harvesting is not supported by *United States* v. *Alaska*, 422 U.S. 184 (1975). In that case this Court rejected the State's claim that Cook Inlet is an "historic bay," and thus a body of inland waters—a claim the State predicated in part on evidence that the federal government had asserted fisheries jurisdiction more than three miles from the shore within the inlet when

Alaska was a territory. This Court rejected the contention that such an exercise of jurisdiction by the United States constituted evidence that the area regulated was generally regarded as inland waters, explaining (422 U.S. at 198-199):

> The assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters. See, *e.g.*, Presidential Proclamation No. 2668, 59 Stat. 885 (1945). This limited circumscription of the traditional freedom of fishing on the high seas is based, in part, on the recognition of the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea. Convention on Fishing and Conservation of the Living Resources of the High Seas, Art. 6, ¶ 1, [Apr. 29, 1958, 17] U.S.T. 138, 141, T.I.A.S. No. 5969.

Nothing in the Court's opinion suggests, however, that such a limited exercise of jurisdiction by a nation state over areas of the high seas contiguous to its territorial sea authorizes a similar exercise of high seas jurisdiction by one of the states within the United States.

In sum, while Alaska might, on a proper factual record, have been able to justify, as a measure aimed at protecting resources within Alaskan territorial limits, the forfeiture of a ship such as the F/V American Eagle for the possession *within* those limits of crab taken from extraterritorial waters (see *Hjelle* v. *Brooks*, *supra*, 377 F. Supp. at 441), its direct regulation of the extraterritorial activities of non-Alaskans in this case clearly exceeded constitutional limits.

2. *Exclusive federal jurisdiction over resources of the outer continental shelf.* The decision below is also erroneous insofar as it rests on the view, expressed in *Alaska* v. *Bundrant*, *supra*, 546 P.2d at 538-548, that the United States does not possess an exclusive claim vis-a-vis the States to sedentary marine species, such as king crab, found upon the outer continental shelf.[7] The federal government has asserted exclusive jurisdiction over natural resources of the outer continental shelf since 1945, and this claim has been recognized by international agreement and domestic law. In particular, with respect to the coastal states of the United States, the "tidelands" litigation in this Court has implicitly recognized the exclusive federal right to such resources;[8] and this right is confirmed by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, read together with the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*

On September 28, 1945, President Truman issued a proclamation stating that "the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but

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[7] By "sedentary" we do not mean necessarily immobile. Rather, that is a technical term denoting marine creatures that cannot move except in constant contact with the seabed or subsoil. See Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 473, T.I.A.S. No. 5578.

[8] We use the term "tidelands litigation" to denote the numerous original actions in this Court between the United States and the various coastal states over the division of rights to natural resources seaward of the natural coastline. That litigation commenced with *United States* v. *California*, 332 U.S. 19 (1947). The disputes have continued to the present day and have involved every coastal state except Washington, Oregon, and Hawaii.

contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control." Pres. Proc. No. 2667, 59 Stat. 884 (1945). As Alaska correctly notes (Motion to Dismiss or Affirm 13-14), the proclamation was precipitated by a concern over mineral rights, notably oil and gas; and in the early tidelands litigation in which States sought to establish their own title to offshore resources, oil was the focus of dispute. See *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). But as the Court remarked in the *Texas* case (339 U.S. at 719):

> Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it might be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of the national rights in it.

In 1953, however, Congress enacted the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, expressly granting to the States exclusive rights to natural resources in the territorial sea—in most instances the area within three nautical miles offshore. In Section 9 of the Act, 43 U.S.C. 1302, however, Congress provided that nothing in the statute should be "deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters * * *." In Section 2(e) of the Act, 43 U.S.C. 1301

(e), Congress defined "natural resources" as including "crabs."[9]

In that same year, Congress enacted the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, declaring to the world that the United States regarded, as subject to its jurisdiction, "the subsoil and seabed of the outer Continental Shelf." 43 U.S.C. 1332(a). In considering this legislation, Congress rejected an amendment offered by Senator Ellender that would have permitted coastal states to extend their jurisdiction, including their tax and conservation laws, to the lands of the outer continental shelf, insofar as such jurisdiction did not interfere with federal policies. 99 Cong. Rec. 7228, 7230-7231 (1953). That amendment was defeated. *Id.* at 7232. As the floor manager of the bill had explained, because of "the intermingling of national and international rights in the area," it was "important that the Federal Government, which has the responsibility for handling foreign relations, have the exclusive control of lawmaking and law enforcement there." 99 Cong. Rec. 6963 (1953) (remarks of Senator Cordon).

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[9] In testimony preceding the passage of the Submerged Lands Act, Congress had been reminded of the substance of the federal claims:

> [T]he Court has three times held that the Federal Government has full dominium and imperium over the submerged land and its resources as against the States, and that it is possessed of whatever is the most accurate description of the full power and right [to] take and enjoy the complete benefit of the mineral and other resources of the bed of the sea.

Submerged Lands: Hearings on S.J. Res. 20 Before the Senate Comm. on Interior and Insular Affairs, 82d Cong., 1st Sess. 376 (1951) (testimony of Solicitor General Perlman).

Five years later, in the Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, the United States signed an agreement with other nations in which, *inter alia*, the claim of the United States to the natural resources of adjacent continental shelf lands was recognized. Article 2.4 of that Convention defined natural resources as "mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." 15 U.S.T. 473.

As the Fifth Circuit in *United States* v. *Ray*, 423 F.2d 16, 21 (1970) (recognizing exclusive federal jurisdiction over coral reefs on the continental shelf beyond state territorial waters) and the dissent in *Alaska* v. *Bundrant*, *supra*, 546 P.2d at 560-562, have correctly reasoned, the Continental Shelf Convention makes explicit what was implicit in the Outer Continental Shelf Lands Act—that the claim of the sovereign to natural resources of the subsoil and seabed of the outer continental shelf is not limited to minerals such as oil and gas, but includes other resources that exist in continuous contact with the seabed. Thus, the king crab in the area in which the violations were found in this case were within the exclusive jurisdiction of the federal government.[10]

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[10] To be sure, as appellee Alaska (Motion to Dismiss or Affirm 11-12) and the Alaska Supreme Court in *Alaska* v. *Bundrant*, *supra*, 546 P.2d at 546-547, point out, Congress disclaimed, in the Outer Continental Shelf Lands Act, any intention of affecting "the right to navigation and fishing." 43 U.S.C. 1332(b). But as the *Bundrant* dissent noted (546 P.2d at 561), reliance on this provision begs the question

3. *Limited significance of the case.* The alleged violations at issue here were committed in January 1976. Later that year, Congress enacted the Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.* ("the Magnuson Act"), which provides for management by the United States of fishery resources, including king crab, within a fishery conservation zone contiguous to the territorial sea and extending 200 nautical miles from the coastline. 16 U.S.C. 1801-1802, 1811-1812. The Act provides for the development of regional fishery management plans by Regional Fishery Management Councils, bodies that include both federal and state representatives. 16 U.S.C. 1852(a)-(c), (h).

We are informed by the Department of Commerce that the North Pacific Fishery Management Council, which includes representatives from the State of Alaska, has prepared a draft "Fishery Management Plan for the King Crab Fishery of the Bering Sea and Aleutian Islands Area." That plan is to be submitted either this month or next to the Secretary of Commerce for review, and it is anticipated that the plan will be in effect by next fall. We are also informed that the plan provides for delegation of certain management tasks to state authorities, under federal oversight.[11]

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whether the harvesting of a sedentary species such as crab constitutes "fishing" within the meaning of the Act, and it disregards the established understanding in international law that the right to harvest crabs is not included in fishing rights.

[11] The Magnuson Act provides, in Section 306(a), 16 U.S.C. 1856(a), that "[n]o State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State." The Act does not define the term "registered," and it has not been finally settled what constitutes registration

As explained above, since the violations for which the F/V American Eagle was declared forfeit were exclusively confined to waters beyond Alaska's three-mile limit, the case does not raise any question of the possible application of "landing law" statutes to non-Alaskan crabbers. For that reason, and because crab harvesting in the area is now controlled by the provisions of the Magnuson Act, the Court may deem it appropriate to reverse the judgment summarily.

CONCLUSION

The Court should note probable jurisdiction and reverse the judgment of the Supreme Court of the State of Alaska.

Respectfully submitted.

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for purposes of this provision. See *People* v. *Weeren*, 26 Cal. 3d 654, 607 P.2d 1279, 163 Cal. Rptr. 255 (1980). Because this case is not governed by the Magnuson Act, the question whether the F/V American Eagle was "registered" under the laws of Alaska within the meaning of Section 306(a) is not presented here.

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